In the Supreme Court

OF THE

United States

OCTOBER TERM, 1915

No. [redacted] 45

PORTUGUESE-AMERICAN BANK OF SAN FRANCISCO,

Appellant,

vs.

PAUL I. WELLES, JOHN DANIEL, Trustee of Metropolis Construction Company, Bankrupt, and THOMAS F. BOYLE,

Appellees.

BRIEF FOR APPELLEES.

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Filed this _____ day of May, 1916.

JAMES D. MAHER, Clerk.

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List of Cases Cited.

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BRIEF FOR APPELLEES.

Statement of Facts and Questions Involved.

The controversy herein involves a fund of $6,830.85 which became payable as the fourth progress payment to the Metropolis Construction Company for work in constructing a sewer under a contract with the Board of Public Works of the City and County of San Francisco.

The Portuguese-American Bank of San Francisco, the appellant, claims under an assignment made to it by the Metropolis Construction Company as security for loans. Paul I. Welles, one of the appellees, claims as a subcontractor, asserting a claim in the nature of a garnishment acquired by giving notice under the provisions of Section 1184 of the Code of Civil Procedure of the State of California. John Daniel, as trustee of the bankrupt Metropolis Construction Company unites in the claim of Welles.

The specifications annexed to the contract under which the work was done, and referred to in the contract and made a part thereof, contain, amongst others, the following provisions:

> "Subcontracts: The contractor shall constantly give his personal attention to the faithful prosecution of the work; he shall keep the same under his personal control; *and shall not assign by power of attorney or otherwise, nor sublet the whole or any part thereof without the consent or authorization of the board of public works.*
>
> With his request to the board of public works for permission to sublet or assign the whole or any part of the herein required work he shall file a copy of the contract which he proposes to enter into for subletting or assigning the whole or any part of the herein required work and he shall state the name and place of business of such subcontractor as he intends employing together with such other information as will enable the board of public works to determine the responsibility and standing of said subcontractor.

No subcontractor will be considered unless the original contract between the contractor and the board of public works is made a part thereof, nor unless it appears to the board of public works that the proposed subcontractor is in every way reliable and responsible and fully able to undertake that portion of the work which it is contemplated to sublet, and to complete said work in accordance with these specifications and to the satisfaction of the board of public works.

No subcontract shall relieve the contractor of any of his liabilities or obligations under this contract. *He shall not, either legally or equitably, assign any of the moneys payable under this contract or his claim thereto unless with the like consent of the board of public works.*" (p. 136 Tr.).

The assignment under which the Portuguese-American Bank asserts its rights was made on December 5th, 1910. The notices to withhold payment under which the appellee Welles claims were given on December 12th and 16th, 1910. The assignment under which the appellant claims being prior in time to the notices to withhold under which the appellee Welles claims, the appellant would be entitled to the fund if the assignment is valid. The appellees, however, submit that the assignment is not valid in that the contract in express terms provides that the contractor "shall not either legally or equitably assign any of the moneys payable under this contract, or his claim thereto, unless with the like consent of the board of public works", and in that the board of public works neither knew nor consented

to the assignment. It must always be borne in mind that the contract here was between the board of public works, acting for and on behalf of the City and County of San Francisco, on the one side. The obligation to pay, here attempted to be assigned, was that of a municipality. The questions, therefore, presented to this court are:

1. Whether a provision in a contract between a municipality and another, rendering a claim for moneys due from the municipality unassignable without the consent of the municipality, is valid.

2. Whether such a provision is merely for the benefit of the municipality.

I.

A PROVISION IN A CONTRACT BETWEEN A MUNICIPALITY AND ANOTHER RENDERING A CLAIM FOR MONEYS DUE FROM A MUNICIPALITY UNASSIGNABLE WITHOUT THE CONSENT OF A MUNICIPALITY IS VALID.

A. Parties to a Contract May Validly Provide that It Shall Not be Assigned.

Parties to a contract may validly prohibit its assignment or the assignment of the benefits thereunder. The general rule is thus stated in *5 Encyc. of Law & Practice* at page 912:

> "The parties to a contract may in terms prohibit its assignment so that neither personal representatives nor assignees can succeed to any rights in virtue of it or be bound by its obligations, and a transfer in such a case creates a

simple personal obligation which can be enforced against the assignor alone." Citing—

(U. S.) (a) *Burck v. Taylor,* 152 U. S. 634; 14 S. Ct. 696; 38 U. S. (L. ed.) 578;

(b) *Amer. Bonding, etc., Co. v. Baltimore, etc., R. Co.,* 124 Fed. 866; 60 C. C. A. 52;

(Cal.) (c) *La Rue v. Groezinger,* 84 Cal. 281; 24 Pac. 42; 18 Am. St. Rep. 179;

(Ill.) (d) *Mueller v. Northwestern University,* 195 Ill. 236; 63 N. E. 110; 88 Am. St. Rep. 194, *citing* this proposition from 2 Am. & Eng. Enc. of Law (2nd ed.) 1035;

(e) *Wabash R. Co. v. Smith,* 134 Ill. App. 574;

(Ind.) (f) *Sargent Glass Co. v. Matthews Land Co.,* 35 Ind. App. 45; 72 N. E. 474;

(Neb.) (g) *Omaha v. Standard Oil Co.,* 55 Neb. 337; 75 N. W. 859;

(h) *Zetterlund v. Texas Land etc., Co.,* 55 Neb. 355; 75 N. W. 860;

(N. Y.) (i) *Devlin v. New York,* 63 N. Y. 9; 50 How. Pr. 1, *modifying* 48 How. Pr. 457;

(j) *Everson v. Gere,* 40 Hun. 248, *affirmed* 122 N. Y. 290; 25 N. E. 492;

(Okla.) (k) *Leader Printing Co. v. Lowry,* 9 Okla. 89; 59 Pac. 242;

(l) *Barringer v. Bes Line Constr. Co.,* 23 Okla. 131; 99 Pac. 775;

(S. D.) (m) *Carter v. State,* 8 S. D. 153; 65 N. W. 422.

In *2 R. C. L.,* paragraph 6, page 599, it is said:

"The parties to a contract may, however, expressly prohibit its assignment, and such stipulation will be recognized and enforced by the courts, and it is not material that the stipulation is limited to the prevention of the assignment of the contract to a designated individual, nor does a statute which, in general terms, makes contracts assignable or enlarges the instances in which they may be assigned have the effect of nullifying stipulations which the parties themselves may make on the subject. In case of the assignment of such a contract all that is acquired by an assignee is the right to maintain an action for damages against the assignor." Citing—

(Ill.) (d) *Mueller v. Northwestern University,* supra;

(N. J.) (n) *De Vita v. Loprete,* 77 N. J. Eq. 533; 77 Atl. 536, Ann. Cas. 1912A 362 and note;

(Wash.) (o) *Lockerby v. Amon,* 64 Wash. 24; 116 Pac. 463, Ann. Cas. 1913A 228 and note, 35 L. R. A. (N. S.) 1064;

(Cal.) (c) *La Rue v. Groezinger*, supra.

In *5 Corpus Juris,* pages 874 through 876, the rule is stated thus:

"It is a general rule * * * that the rights of one party to a contract to its performance by the other may be assigned unless such assignment is forbidden or unauthorized by statute or by the terms of the contract itself. The parties to a contract may in terms prohibit its assignment so that neither the personal representatives nor assignees can succeed to any rights in virtue of it nor be bound by its obligations, and an attempted transfer in such a case creates a simple personal obligation which can be enforced only against the assignor." Citing:

(U. S.) (b) *Amer. Bonding etc., Co. v. Baltimore, etc., R. Co.,* supra;

(Ala.) (p) *Tabler v. Sheffield Land, etc., Co.,* 79 Ala. 377; 58 Am. R. 593;

(Fla.) (q) *Hall v. O'Neil Turpentine Co.,* 56 Fla. 324, 336; 47 S. 609; 16 Ann. Cas. 738 (citing *Cyc.*);

(Ga.) (d) *Mueller v. Northern Univ.,* supra;

(Ind.) (r) *Deffenbaugh v. Foster,* 40 Ind. 382;

(Md.) (s) *Andrew v. Meyerdirck*, 87 Md. 511; 40 A. 173;
(Mass.) (t) *Wakefield v. American Surety Co.*, 209 Mass. 173; 95 N. E. 350;
(Nebr.) (h) *Zetterlund v. Texas Land, etc., Co.*, supra;
(N. Y.) (i) *Devlin v. Mayor*, supra;
(Okla.) (l) *Barringer v. Bes Line Constr. Co.*, supra;
(R. I.) (u) *Swartz v. Narragansett Elec. Lighting Co.*, 26 R. I. 388; 59 A. 77 (rearg den 26 R. I. 436, 59 A. 111);
(S. D.) (m) *Carter v. State*, supra;
(Wash.) (o) *Lockerby v. Amon*, supra;
(v) *Bonds-Foster Lumber Co. v. Northern Pac. R. Co.*, 53 Wash. 101, 877;
(Man.) (w) *Fraser v. Canadian Pac. Ry. Co.*, 19 West L. R. 369.

B. Such a Provision Is Not a Restraint on Alienation.

The appellant contends that moneys due under a contract constitute a debt which is rightfully subject to free alienation, and that a provision in a contract rendering moneys due under it non-assignable without consent is void as a restraint on alienation by the laws of California. Counsel bases his argument upon certain insurance cases, holding that a

provision in an insurance contract prohibiting assignments after loss invalid and upon certain code sections of the State of California.

Section 711 of the Civil Code of the State of California provides

> "Conditions restraining alienation, when repugnant to the interest created, are void."

As stated in appellant's brief, page 59, this provision has been decided to be merely declaratory of the common law by the Supreme Court of the State of California.—In *Murray v. Green,* 64 Cal. 363 at 366.

We find no instance in which the rule declaring that conditions restraining alienation, when repugnant to the interest created, are void, was applied to contracts prohibiting their assignments. The rule is usually applied to an attempted restraint on the alienation of estates in real property, such as the case of *Murray v. Green,* supra, cited by appellant. It is true that the rule has also been extended to attempted restraints on alienation of tangible personal property, as in the case of *Bradley v. Piexotto,* 3 Ves. Jr. 324, cited by appellant, but this is the limit of the application of the rule. It has never been applied so as to render void inhibitions against assignments contained in contracts themselves. The Supreme Court of the State of California, in *La Rue v. Groezinger,* 84 Cal. 281 at 283, in relation to this matter said:

> "These sections seem to do away with whatever restrictions there may formerly have been upon the power of the parties to assign their ordinary contracts. It is clear, however, that the provision cannot be construed to render assignable all contracts whatever, regardless of their nature or effect; but must be taken with some qualification. *In the first place, it is not intended to render null any agreement that the parties may have made on the subject.* Hence, if the contract itself provides in terms that it is not transferable, it certainly cannot be transferred, although it otherwise might be so."

That a contract may by its very terms prohibit its assignment is a well established general rule of the common law, as shown by the encyclopedic quotations given and the cases there cited.

The interest of parties under a contract arises by virtue of the consent of the parties thereto. The interest is created by the act of the parties in giving that consent. Since the interest created depends upon the consent of the parties, no reason appears why they cannot limit that interest by limiting their consent. If the parties desire to create an interest which is not transferable, it is submitted that they have not violated the rule making conditions restraining alienation, when repugnant to the interest, void.

The property interest of the owner of an estate in real property or of tangible personalty is defined and prescribed by law. The rights, powers and privileges of a fee simple or life estate in real property, or of the absolute ownership of tangible per-

sonal property does not depend on the acts or consent of persons. The incidents or attributes of those interests are defined by law. It is true that ordinarily consent must be obtained to effectuate a transfer of those interests, but the incidents of the interests themselves do not depend upon such a consent. The incidents of the interests are defined by law.

The rights arising out of a contract, however, are not in this category. The incidents or attributes of the interest depend upon the consent of the parties, and the consent of the parties governs. Therefore, it is submitted that Section 711 of the Civil Code has no application to contracts which themselves prohibit their assignment. The interests created are limited in their creation. No attempt is made to limit an interest created by law.

C. Insurance Cases Not in Point.

Appellant cites a number of insurance cases, holding ineffectual a provision in the policy of insurance that an assignment, either before or after loss, should be void, insofar as it concerned an assignment of the right to recover on the policy after loss had been sustained. It will be admitted that there is certain language contained in these decisions which tends somewhat to support the contention of appellant. It is submitted, however, that these cases are not in point. They are to be distinguished because of the peculiar nature of insurance contracts.

The contract of insurance is a unilateral contract, formed mainly in the interest of the insurers, the

insured being compelled to accept the form offered in order to secure insurance. The construction is always liberal to the insured.

Richards on Ins. Law (3rd ed.), Par. 90, page 111;

Liverpool & London & Globe Ins. Co. v. Kearney, 180 U. S. 132; 45 L. Ed. 460;

Amer. Surety Co. v. Pauly, 170 U. S. 133 at 144; 18 Sup. Ct. 552;

Thompson v. The Insurance Company, 156 U. S. 1087; 10 Sup. Ct. 1019.

In *Liverpool & London & Globe Insurance Company v. Kearney,* supra, Mr. Justice Harlan said in part at 136:

> "The argument in behalf of the defendant assumes that the insurance company is entitled to the literal interpretation of the words of the policies, but the rules established for the construction of written instruments apply to contracts of insurance equally with other contracts. * * * To the general rule there is an apparent exception in the case of contracts of insurance, namely, that where a policy of insurance is so formed as to leave room for two constructions, the words used should be interpreted most strongly against the insurer. The exception rests upon the ground that the company's attorneys, officers or agents prepared the policy and it is its language that must be interpreted."

An insurance policy is peculiarly one of a personal nature. The insurance company may be willing to insure one man against a certain loss and not insure another. For this reason it is held that

even without express prohibition in the policy a policy of fire insurance is not assignable except with the consent of the insurer.

Richards on Ins. Law (3rd ed.) Par. 268 at page 353;

New Eng. Loan & Trust Co. v. Kenneally, 38 Neb. 895; 57 N. W. 759;

Let v. Guardian Fire Ins. Co., 125 N. Y. 82; 25 N. E. 1088.

In *Let v. Guardian Fire Ins. Co.* (supra), Justice Gray, in rendering the opinion of the court, said:

> "The policy of insurance is distinctly a personal contract by which the insurer undertakes to indemnify the party named in the writing against loss in a manner and subject to the conditions therein described. The obligation does not pass with the insured property to an assignee or purchaser thereof without the consent of the insurer. Such a consent alone can keep in life this agreement. This is a rule which is of long standing and needs no discussion."

In *New England Loan & Trust Company v. Kenneally,* Justice Harrison, in rendering the opinion of the court, said:

> "The general rule of law is that a policy of fire insurance is a personal contract with the party insured and does not run with the land or pass to the purchasers by a sale of the premises or property insured, and any assignment of the policy must be with the knowledge and consent of the insurer. After loss the personal nature of the contract has to a large extent gone. The element of personal risk no longer exists and all that remains to be done is the payment of the money by the insurance company."

As stated in *Spare v. Home Mutual Insurance Company,* 17 Fed. 658, cited by appellant, pointing out the true ground of this distinction—

> "But the stipulation that the policy shall be void if so assigned (without consent) after the fire, stands on a different footing. When the proof of loss was made and the liability of the defendant under the policy fixed the relations between the parties was changed from insurer and insured to that of debtor and creditor, and the *delectus personae* of the contract was no longer material."

It is believed that these insurance cases are to be distinguished because of the rule requiring the insurance contracts to be construed against the insurer. If they are not to be distinguished on some such ground they are clearly contrary to the general rule and the weight of authority, to the effect that contracts made by their very terms validly prohibit their assignment.

The appellant suggests that the true basis of these insurance cases is that after loss all that remains is the obligation of the insurer to pay the insured the amount of the loss. In others words, that after loss there exists merely a chose in action in favor of the insured against the insurer to recover a sum of money, to wit, the amount of the loss, and this is assignable. This argument has been advanced in a number of other cases in which there was an attempted assignment of an obligation to pay money in the face of an express prohibition of such an

assignment in the contract giving rise to the obligation to pay the money.

D. Parties May Validly Prohibit Assignment of Moneys Due Under Contract.

In *Tabler v. Sheffield Land, Iron & Coal Company,* 79 Ala. 377; 58 Amer. Rep. 593, the appellants as plaintiff in a court below brought action against the appellees to recover a certain amount alleged to be due them as transferees of a large number of labor tickets or time checks issued by the defendant. The instruments were printed and were denominated on their face as being a labor ticket. All of these tickets were payable June 15, 1884, "to employees only" and are endorsed "not transferable". The lower court on demurrer to the complaint held that the action would not lie because the labor tickets provided that they were not assignable. This ruling was sustained by the Supreme Court of Alabama, which said in part—

> "We are of the opinion that this ruling was free from error. The certificates show, on their face, that they are payable to the employees only, and to no one else. They are expressly declared not to be transferable, which negatives any promise of defendant otherwise implied, that payment would be made to any assignee or transferee of the holders. They were issued with this express understanding, which was assented to by the employees when they received them; and the plaintiffs took the instruments with full notice of this restriction, because it appeared on the face of the paper. The transferability of the paper was thus destroyed by

the consent of the original parties to it. *Durr v. State,* 59 Ala. 24.

It cannot be said that the policy of the law is opposed to the restriction thus imposed. On the contrary, under the peculiar circumstances of this case it highly favors such restriction."

In *Stanley v. The Sheffield Land, Iron & Coal Company,* 83 Ala. 261; 4 Southern 44, the case last cited was followed.

In *Barringer v. Bes Line Construction Co.* (1) supra, the Oklahoma court, in the most thoroughgoing and instructive decision upon this subject, held a similar time check non-assignable, the court saying in part—

"The only question presented by the record in this case is whether the time checks sued upon are assignable. The language of these certificates and of the agreements executed by the payees at the time they received the time certificates is not ambiguous. It is clear that it was the intention of the construction company to stipulate, and of the payees of the time checks to agree, that they should not be assigned; and unless there is some provision of law that renders this part of the contracts inoperative, plaintiff in error was not entitled to recover. It is the contention of plaintiff in error, that Par. 4163, Wilson's Rev. & Anno. Stat., which reads, 'a thing in action, arising out of the violation of a right of property, or out of an obligation, may be transferred by the owner', has this effect. The only authority cited by plaintiff in error that is applicable and supports his contention is the case of Bewick Lumber Co. v. Hall, 94 Ga. 539, 21 S. E. 154. In that case it was sought to recover upon a credit check which contained a stipulation that it was

not transferable. The court held, under a statute providing that all choses in action arising upon a contract were assignable, so as to vest the title in the assignee, that the action could be maintained. The opinion is very brief. The court neither assigns reasons nor cites authorities in support of the conclusion which it reached. In our opinion this case is against the weight of authorities. At common law rights arising out of contracts, except certain classes, to which belonged negotiable instruments, were not assignable without the consent of the adverse party. The right of an assignee, however, was recognized and enforced in courts of equity where the assignor refused to permit the assignee to bring an action at law in the assignee's name. Under the influence of the doctrine of the equity courts, the common-law rule became a mere rule of pleading, in that an assignment of contractual rights could not be made so as to authorize the assignee to maintain suit in his own name. But this rule, in most jurisdictions, has now been modified until an assignee can maintain an action in his own name. The change has been due largely to statutes which may be divided into two classes: One class, consisting of statutes similar to ours, providing that choses in action may be transferred; and the other class, providing that an action must be brought in the name of the real party in interest. 3 Page, Contr. p. 1935. The same author, on page 1936 of the same volume, in discussing what contracts may be assigned, excepts therefrom the following three classes: Personal contracts; contracts containing a provision against assignment; and contracts forbidden by statute to be assigned. The effect of plaintiff in error's contention is that Par. 4163, Wilson's Rev. & Anno. Stat., supra, not only authorizes assignment of choses in action arising out of contracts, but forbids the execution of contracts in

> which it is stipulated that no assignment may be made. We are unable to concur in this contention. The purpose of this statute was not to prohibit parties from contracting that their contracts shall not be assignable. The intention of this statute and of similar statutes, as they exist in other states, is to remove the restriction of the common-law rule upon choses in action which prevented their transfer, and to permit the assignee to maintain suit in his own name."

The Oklahoma court then cites the language of Mr. Justice Gray of the Supreme Court of the United States in *Arkansas Valley Smelting Company v. Belden Co.*, 127 U. S. 379; 32 L. ed. 246; 8 Sup. Ct. Rep. 1308, to the following effect:

> "'At the present day, no doubt, an agreement to pay money or to deliver goods may be assigned by the person to whom the money is to be paid or the goods are to be delivered, if there is nothing in the terms of the contract, whether by requiring something to be afterwards done by him, or by some other stipulation, which manifests the intention of the parties that it shall not be assignable; but everyone has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent.' The doctrine announced in this case is approved in Delaware County v. Diebold Safe & Lock Co., 133 U. S. 473, 33 L. ed. 674, 10 Sup. Ct. Rep. 399, and in Burck v. Taylor, 152 U. S. 635, 38 L. ed. 578, 14 Sup. Ct. Rep. 696."

The court then goes on to discuss the effect of the payees of the time checks accepting the same, saying in part:

"In the case at bar the payee of each time check had an open account with the construction company before his acceptance of the time check in payment thereof, which could be assigned; but the time check is a new and independent contract from the contract of the payee and of the construction company on open account. That the construction company did not desire to deal upon the certificate with any other person than the payee is expressly indicated by the language of the contract, and assented to by the payee, not only by his acceptance of the contract containing a stipulation that it shall be nontransferable, but also by his affirmative act in signing an agreement to that effect. What might have been the reason of the construction company for desiring to deal with no other person under those contracts than the payees therein is unnecessary for us to conjecture. The argument that the payee in the time check was in better condition before accepting the time check in settlement of his rights under the open account is without force. Evidently the payee did not think so, or he would not have entered into this second contract in full settlement of his rights under the former contract."

The court then cited and discussed at length the case of *Omaha v. Standard Oil Co.* (g) supra, which will be more extensively dealt with later on. It then cites *Zetterlund v. Texas Land etc. Co.,* (h) supra, and *Murphy v. Plattsmouth*, 78 Neb. 163; 110 N. W. 749. The court then cites, with approval, and examines at length *State ex rel. Kansas City Loan Guarantee Company v. Kent*, 98 Mo. App. 281; 71 S. W. 1066, which will be examined later. It then cites with approval *Tabler v. Sheffield Land, Iron & Coal Company*, above discussed, saying in part:

"In that case an action was brought by the assignee of a labor ticket in which it was stipulated that the ticket should not be transferable, and should be payable to employee only. The court held that the agreement of the parties that the same should not be transferable destroyed the right of the payee therein to assign the same, and that the assignee could not recover. In the case at bar the payee of each time check had with the construction company a contract of employment, the terms of which do not appear from the record. On this contract (whether oral or written does not appear) the construction company became indebted to each employee on open account for services performed, and most of the employees became indebted to the construction company for board, supplies, and other material furnished. The employee's right under his open account was assignable; but he by contract with the construction company settled his rights under the open account by accepting therefor the time check. The rights of the parties under the contract made by them are not to be determined by whether one or the other is in a better position than before he made it, but whether they had the capacity to make it, and the contract made is not forbidden by law. The construction company agreed to execute a time check in settlement of its obligations under the open account, upon the condition that the time check should not be assignable, and should be presented in person, and payment thereof receipted in person by the payee therein. The employees accepted this written obligation of the construction company in preference to, and in settlement of, the obligation of the company under the open account. There is no contention that the payees of the time checks have performed their part of the agreement by presenting the checks for payment and offering to receipt for same."

It next dealt with the proposition that the provision prohibiting the assignment of a contract was contrary to public policy, saying in part:

> "It is argued that this contract is contrary to public policy; but it has not been made to appear in what respect it is injurious to the public, nor does it appear to be in violation of any statutory provision or any rule of the common law. The statute does not forbid such contracts, and at common law choses in action were not alienable even without a stipulation that they should not be alienable; and the assignments of the certificates in this case are in violation of the contracts, and are therefore void as between the maker of the certificates and the assignees."

From these authorities it is evident that the general rule is that contracts may validly prohibit their assignment or the assignment of any moneys due under the contracts. The insurance cases cited by appellant to the effect that insurance companies cannot limit the power of the insured to assign the benefits of the policy after loss has been sustained must either be considered an exception to the general rule because of the peculiar nature of insurance policies, or be considered contrary to the general rule and the weight of authority.

E. In Contracts of Municipality Additional Reasons for Holding Valid Prohibition of Assignments of Moneys Due Thereunder.

Conceding that the general rule that contracts may properly prohibit their assignment or the assignment of moneys due thereunder be erroneous,

and conceding that the rule which appellant claims the insurance cases stand for, to wit, that where attempted to be assigned is merely a chose in action to recover money, the free alienation of the same cannot be restricted by contract, it is submitted that the case at bar would be an exception to such a rule. In the case at bar we are not dealing with the obligation to pay of an ordinary individual. We are dealing with the obligation of a municipality. The obligation of a municipality stands on an entirely different footing than the obligation of an ordinary individual. This distinction is indicated by the well known rule that municipal revenues are exempt from judicial seizure for debts. Speaking in this regard, Judge Dillon, in his work on *Municipal Corporations,* 5th ed., Volume 1, Section 248, page 467, says:

> "Municipal corporations are instituted by the supreme authority of a State for the public good. They exercise by delegation from the legislature a portion of the sovereign power. The main object of their creation is to act as administrative agencies for the State and to provide for the police and local government of certain designated civil divisions of its territory. To this end they are invested with certain governmental powers and charged with civil, political, and municipal duties. To enable them beneficially to exercise these powers and discharge these duties, they are clothed with the authority to raise revenues, chiefly by taxation, and subordinately by other modes, as by licenses, fines, and penalties. The revenue of the public corporation is the essential means by which it is enabled to perform its appointed

work. Deprived of its regular and adequate supply of revenue, such a corporation is practically destroyed, and the ends of its erection thwarted. Based upon considerations of this character, it is the settled doctrine of the law that not only the public property but also the taxes and public revenues of such corporations cannot be seized under execution against them, either in the treasury or when in transit to it. Judgments rendered for taxes, and the proceeds of such judgments in the hands of officers of the law, are not subject to execution unless so declared by statute. The doctrine of the inviolability of the public revenues by the creditor is maintained, although the corporation is in debt, and has no means of payment but the taxes which it is authorized to collect."

Upon similar considerations of public policy municipal corporations and their officers are not subject to garnishment to reach and apply moneys owing by them to third persons to the payment of debts of the latter although private corporations equally with natural persons are liable to this process. As stated by Judge Dillon in paragraph 249, Volume 1, page 469,

> "This exemption is usually placed upon *grounds of public policy* based upon the following considerations. Municipal corporations are, to a large extent, in the exercise of governmental powers; they control pecuniary interests of great magnitude, and to permit the public duties of these corporations to be imperfectly performed in order that individuals may the better collect their private debts is to pervert the objects of their creation. **If a city cannot, at short intervals, make a settlement of its multitudinous accounts, but is liable to be drawn into court**

> **at the suit of every creditor of those to whom it owes money, it will not only be engaged in much expensive and vexatious litigation in which it has no interest, but, if unable to pay safely the money which it owes, it may lose the services of persons that may be of much value. A municipal corporation exists simply for the public welfare, and cannot be required to consume the time of its officers or the money in its treasury in defending suits in order that one private individual may the better collect a demand due from another.** Upon considerations, such as these, numerous cases in various States hold that debts owing by a municipality cannot be made the subject of garnishment in the absence of express statutory enactment subjecting them to the process."

The reasons of public policy exempting municipal revenues from judicial seizure for debts, and exempting municipal corporations and their officers from garnishment of moneys owing by them to third persons, apply with equal force to render valid a contractual provision against the assignment of moneys owed by it without its consent. Just as much reason exists for exempting a city, when it has so contracted, from expensive and vexatious litigation with assignees of the municipality's creditor as with garnishing creditors of the municipality's creditor. **There is no more reason to require a municipality to consume the time of its officers or the money in its treasuries in defending suits against rival assignees of the municipality's creditor, than to require it to consume the time of its officers or the money in its treasuries in defending suits against garnishing creditors of the municipality's creditor.**

In *City of Omaha v. Standard Oil Company,* (g) supra, this point is emphasized. In that case it appeared that the Metropolitan Street Lighting Company entered into a written contract with the City of Omaha to light certain of its streets with gasoline lamps for the period of two years. The consideration was to be paid in monthly installments. The Standard Oil Company, the plaintiff in said suit, furnished the necessary oil, and at one time loaned a considerable sum of money to the lighting company to enable it to carry out its contract with the city, and to secure an indebtedness thus incurred, the lighting company assigned to the plaintiff the moneys due under the contract for the month of October, 1892. The contract between the city and the Metropolitan Street Lighting Company expressly prohibited the assignment of the contract without the assent of the city. The court held that this provision made the assignment by the Metropolitan Street Lighting Company to the Standard Oil Company void, saying in part:

> "Counsel for the plaintiff insists that this stipulation was directed against the assignment of the obligation resting on the Lighting Company to perform the work required by the contract, and was not intended to prevent an assignment of the money to be earned thereunder. That view was accepted by the trial court, but we think it is not warranted by a just interpretation of the language employed. The inhibition, it will be noticed is not alone upon the assignment of the obligation to light the streets, but upon the assignment of the contract. What was the contract between the

parties? Certainly one of its important elements was the duty laid upon the city to make monthly payments to the Lighting Company for the services rendered, and another was the correlative right of the company to receive such payments. The assignment of the October installment, if valid, not only transferred to the plaintiff a right secured to the Lighting Company by the contract, but affected as well, an important obligation on the part of the city. **It compelled the city to deal with strangers, and to determine at its peril which of the contesting claimants was entitled to the fund. This may have been one of the very contingencies contemplated by the city, and against which it sought to provide by making the contract non-assignable."**

In *Murphy v. City of Plattsmouth*, 78 Neb. 163; 110 N. W. 749, the plaintiff brought suit against the City of Plattsmith to recover a small balance due on a written contract made between the defendant city and one Fanning, for the paving of certain streets in that city. The plaintiff claimed the balance as Fanning's assignee. The contract between the city and Fanning in express terms prohibited its assignment without the consent of the city. The court held that this assignment was invalid on the authority of *Omaha v. Standard Oil Company*, (g) supra, saying in part:

> "In City of Omaha v. Standard Oil Co., 55 Neb. 337, 75 N. W. 859, the plaintiff claimed as assignee under a contract containing a stipulation of this character, and this court held that the contract was non-assignable. *Counsel there advanced the proposition that the stipulation was merely directed against the assignment of the obligation resting upon the*

assignor by virtue of the contract, and was not intended to prevent an assignment of the money to be earned thereunder. But this court refused to adopt that view; and after speculating to some extent as to the object of the stipulation, disposed of the matter in these words: 'But it is needless for us to speculate on the motives for the city's action. It is enough for us to know—whatever its reasons may have been—that it has, in plain language, stipulated against an assignment of the contract. That stipulation is valid and must be enforced. To hold that it covers some, but not all, of the rights and obligations arising out of the contract, would be, it seems to us, an inexcusable perversion of its terms'."

In *State ex rel. Kansas City Loan Guarantee Co. v. Kent*, 98 Mo. Ap. 281; 71 S. W. 1066, the relator sued as the assignee of an account of $8.75 for labor in the stables of the waterworks department of Kansas City, Mo., performed by one Dock Wilson. The defendant was the auditor of Kansas City, and refused to give to relator, as such assignee, a city warrant for said sum. The relator thereupon instituted this proceeding by mandamus to compel the delivery of the warrant. The trial court granted the writ and the city appealed. The refusal of the city auditor was based upon an ordinance of the city prohibiting an assignment of wages or salary. The court held that such ordinance had the force of a contractual provision as between the city and the laborer, and held the assignment void on that basis, saying in part:

"It therefore comes to this question, is it a valid contractual provision to insert in a con-

tract with a municipality that a claim for the wages arising thereunder shall not be assigned? We think that it undoubtedly is. City of Omaha v. Standard Oil Co., 55 Neb. 337, 75 N. W. 859; Burck v. Taylor, 152 U. S. 634, 14 Sup. Ct. 696, 38 L. Ed. 578. While the right to assign a matured claim may be a fundamental right existing in the owner of the claim, as contended by relator, it does not follow that he may not curtail such right by contract. And so it is said that: 'A contract to pay money may doubtless be assigned by the person to whom the money is payable, *if there is nothing in the terms of the contract* which manifests the intention of the parties to it that it shall not be assignable.' Delaware Co. v. Diebold Safe Co., 133 U. S. 473, 478, 10 Sup. Ct. 399, 33 L. Ed. 674. 'At the present day, no doubt, an agreement to pay money or to deliver goods may be assigned by the person to whom the money is to be paid or the goods are to be delivered, if there is nothing in the terms of the contract, whether requiring something to be afterwards done, or by some other stipulation which manifests the intention of the parties that it shall not be assignable.' Arkansas Smelting Co. v. Belden Min. Co., 127 U. S. 379, 387, 8 Sup. Ct. 1308, 32 L. Ed. 246. A right which, for a consideration, is contracted away, is not any longer a right to be asserted by the contractor. **The agreement in this case was that the city would pay to Wilson a stipulated sum per day if he would do certain work, and surrender his right of assignment of his claim for such work to a third party. Wilson had as much legal capacity to agree to forego his ordinary right of assignment, as he had to agree to perform the labor itself."**

In page 18 of appellant's brief, appellant refers to (g) *City of Omaha v. Standard Oil Company,*

supra, and *Murphy v. City of Plattsmouth,* and states that these cases are to be distinguished from the one at bar in that both of these cases involved contracts executory on both sides. It is submitted that this statement is not true. In *City of Omaha v. Standard Oil Company* the matter involved was the October installment of the moneys owed by the City of Omaha to the Metropolitan Street Lighting Company. The court in this case, speaking on this point, said:

> "It may be conceded that while a contract right to render personal services cannot be assigned without the consent of the person to whom the services are due, the right to receive pay for such services when rendered stands upon a different ground and is assignable in the absence of a statute or stipulation in the contract forbidding it * * * and the validity of such an assignment, it seems, does not at all depend upon the money being presently due and payable. If the fund has a potential existence (that is if it will become due in the future under the terms of a contract already made), the assignment vests an equitable title thereto in the assignee prior to all prior charges * * * so the assignment of the October installment was valid and the plaintiff acquired an equitable property therein unless the right to assign was prohibited by the contract itself."

The court then proceeds to find that the contract itself did prohibit such an assignment and rendered the same invalid. This case did not go off on the ground that the contract was executory. The decision in the case was based upon the

grounds that the contract with the municipality expressly prohibited the right to assign moneys due under the contract. In *Murphy v. City of Plattsmouth,* the contract was not executory in so far as the contractor was concerned. The contract had been completed by the contractor and all that remained to be done was the payment of the moneys due by the city. So, too, the case of *State ex rel. Kansas City Guarantee Co. v. Kent* involved a contract that was executed in so far as the contractor was concerned, and was executory only so far as the city had failed to pay the money due thereunder.

It is submitted that these authorities establish the proposition that a municipality may validly contract so as to limit the power of its obligee to assign the obligation against the municipality without its consent. A municipality would have this power even if it be conceded that the power did not generally exist. The purposes of the institution of municipal corporations is to act as administrative agencies for the State and to provide for police and local government. They exist merely for the public welfare and should be allowed to avoid consuming the time of their officers and the moneys in the treasuries in defending vexatious and expensive litigation in which it has no personal interest whatsoever.

Therefore, we conclude that a provision in a contract between a municipality and another, rendering a claim for moneys due from the munici-

pality unassignable without the consent of the municipality, is valid.

II.

A PROVISION RENDERING MONEYS DUE UNDER A CONTRACT UNASSIGNABLE EITHER LEGALLY OR EQUITABLY IS NOT MERELY FOR THE BENEFIT OF THE MUNICIPALITY, BUT RENDERS INVALID AN ATTEMPTED ASSIGNMENT, WITHOUT SUCH A CONSENT.

A. This Rule Has Been Established by the Supreme Court of the United States.

Appellant devotes the greater portion of his brief to the establishment of the proposition that the provision in the contract, that the contractor shall not either legally or equitably assign any of the moneys payable under the contract, was inserted for the sole benefit and protection of the city and not for the benefit of anyone else. The Supreme Court of the United States has directly passed upon this proposition in *Burck v. Taylor,* (a) supra.

In that case it was contended by counsel that such a provision was solely for the benefit and protection of the State or municipality, and the benefit of the same cannot be claimed by anyone but the municipality. The court in that case carefully considered and examined the contention of counsel, and decided expressly that the provision could be availed of not only by the State but by anyone else. It found that any assignment made without the consent of the State or municipality

was absolutely void, and created no rights in the assignee, save possibly an individual and personal liability on the part of the assignor to the assignee.

Appellant seeks diligently to distinguish the case of *Burck v. Taylor,* and on page 20 of his brief says in relation to the decision in *Burck v. Taylor—"that decision cannot be correctly apprehended by reading isolated extracts from it".* Appellant then gives an extract of 28 lines from page 645 to 646, and then on page 21 of his brief gives an extract of the same length from page 650 to 651 of the opinion of the court. Appellant, however, omits entirely four pages of the decision which passes directly on the point at issue. He starts out by advising us that we cannot correctly apprehend the decision by reading isolated extracts therefrom, and then attempts to explain the decision on the basis of two small isolated extracts. The contention that the prohibition of assignment, without the written consent of the State or municipality was merely for the benefit of the State or the municipality, was directly presented to the court in that case. On page 646 the court says:

> "It is earnestly insisted by counsel that this provision forbidding an assignment without the written consent of the state authorities was solely for the benefit and protection of the State; that it did not restrict or interfere with the right of the contractor to dispose, in any way he saw fit, of an interest in the contract, or the profits thereof, so long as the party to whom such transfer was made attempted no in-

terference with the actual work, and presented no claim against the State. The contract in the possession of the contractor was his property, and the profits arising therefrom, and any interest therein, were as much the subject of disposal as any other property, *and the only limitation was one for the benefit of the State and could not be claimed by any subsequent assignee from the contractor.*"

In the face of this language how can it be doubted that the court in *Burck v. Taylor* directly passed on the question of whether such a provision was for the sole benefit of the State? The court continues:

"The case of *Hobbs v. McLean,* 117 U. S. 567, 576, is relied upon as authority for this contention. In that case one Peck having, in response to an advertisement from the proper authorities, put in a bid for furnishing wood and hay to the government and expecting that the contract would be awarded to him, entered into a partnership with McLean and Harmon, by which Peck was to furnish one-half of the capital necessary to carry on the partnership business, and McLean and Harmon each one-fourth, the profits and losses of the partnership to be divided in like proportion. The partnership was for the purpose of carrying out this expected contract. Subsequently, the contract with the government was obtained, and after it had been performed and the money therefor paid to an assignee in bankruptcy of Peck, the other partners, McLean and Harmon, filed their bill to recover their proportionate share of the profits as fixed by the terms of this partnership. Among the defences was that the partnership was invalid by reason of section 3737, Revised Statutes, which reads as

follows: 'No contract or order, or any interest therein, shall be transferred by the party to whom such contract or order is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred, so far as the United States are concerned. All rights of action, however, for any breach of such contract by the contracting parties, are reserved to the United States.'

But this defence was overruled, the court, by Mr. Justice Woods, observing in respect thereto:

'Interpreting the articles in the light of the statute, as it is the duty of the court to do, they were not intended to transfer, and do not transfer, to the plaintiffs any claim or demand, legal or equitable, against the United States, or any right to exact payment from the government by suit or otherwise. They may be fairly construed to be the personal contract of Peck, by which, in consideration of money to be advanced and services to be performed by the plaintiffs, he agreed to divide with them a fund which he expected to receive from the United States, on a contract which he had not yet entered into. This is the plainly expressed meaning of the partnership contract, and it is only by a strained and forced construction that it can be held to effect a transfer of Peck's contract with the United States, and to be a violation of the statute.

We are of the opinion that the partnership contract was not opposed to the policy of the statute. The sections under consideration were passed for the protection of the government. *Goodman v. Niblack,* 102 U. S. 556. They were passed in order that the government might not be harassed by multiplying the number of persons with whom it had to deal, and might always know with whom it was dealing until the contract was completed and a settlement

made. Their purpose was not to dictate to the contractor what he should do with the money received on his contract after the contract had been performed.'

It is insisted that, tested by the rule thus laid down, this stipulation of clause 26 was one solely for the benefit of the State, and worked no restriction on the right of the contractor to dispose, in advance of the completion of the contract, of the profits which should enure therefrom.

We cannot concur in these views. By the section quoted not only was a transfer of the contract prohibited, but also the result of such forbidden transfer declared. In terms it was said that any 'such transfer shall cause the annulment of the contract or order transferred, so far as the United States are concerned'. *Expressio unius est exclusio alterius.* The express declaration that so far as the United States are concerned a transfer shall work an annulment of the contract, carries, by clear implication, the declaration that it shall have no such effect as between the contractor and his transferee. In other words, as to them, the transfer is like any other transfer of property, and controlled by the same rules. Its invalidity is only so far as the government is concerned, and it alone can raise any question of the violation of the statute. The government in effect, by this section, said to every contractor, you may deal with your contract as you please, and as you may deal with any other property belonging to you, but so far as we are concerned you, and you only, will be recognized either in the execution of the contract, or in the payment of the consideration. It is familiar law that not every contract in contravention of the terms of a statute is void, and the courts will search the language of the statute to see whether it was the intent of the makers that

a contract in contravention of it should be void or not. *Harris v. Runnels,* 12 How. 79; *Miller v. Ammon,* 145 U. S. 421; *Pangborn v. Westlake,* 36 Iowa, 546.

It was in pursuance of this line of thought that the court, in *Hobbs v. McLean,* ruled as it did as to the effect of a transfer by a contractor with the United States of an interest in his contract to a third party. But it has never been doubted that, as a general rule, a contract made in contravention of a statute is void and cannot be enforced, and the only exception arises when, from an examination of the statute, the courts are able to discern a different or a limited purpose on the part of the law makers."

It is true that in the quotation just given the court was dealing with the construction of the statute. It is true that in the case at bar we have no construction of a statute—we are construing the terms of a contract, but it is equally true that the very next words of Mr. Justice Brewer recognize that fact. His opinion continues:

"It is true that, in the case at bar, we have no construction of a statute, but only of the terms of a contract. That contract, however, was as binding on the one party as the other. The contractor assented to its terms precisely as did the State, and his promise was not to assign the contract in whole or in part without the consent in writing of the state authorities. *It was a promise which entered into and became one of the terms of the contract, and one which was binding, not only upon the parties, but upon all others who sought to acquire rights in it. It may be conceded that, primarily, it was a provision intended, although not*

expressed, for the benefit of the State, and to protect it from interference by other parties in the performance of the contract, to secure the constant and sole service of a contractor with whom the State was willing to deal, and to relieve itself from the annoyance of claims springing up during or after the completion of the contract in favor of parties of whose interests in the contract it had no previous knowledge, and to the acquisition of whose interests it had not consented. Concede all this, and yet it remains true that it was a stipulation which was one of the terms of the contract and binding upon the contractor, and equally binding upon all who dealt with him."

What language could be plainer—what language could be stronger to the effect that such a provision of contract could not only be availed of by the State of municipality, but could also be availed of by anyone else? Clearly, the Supreme Court of the United States has gone on record in this case that a provision prohibiting the assignment of a contract without consent rendered an attempted assignment invalid and ineffectual, not only as to the State or municipality, but also as to all other parties.

Before the Circuit Court of Appeals appellant made a similar contention to that made here. Before the Circuit Court he contended that a provision against assignment is intended for the benefit of the city alone and no one else can complain of its breach, but the Circuit Court rejected the contention of appellant on the authority of *Burck v. Taylor,* saying in part:

"It is contended further that such a provision against assignment is intended for the benefit of the city alone, and that no one else can complain of its breach. Fortunato v. Patten, 147 N. Y. 277, 41 N. E. 572, is cited as a case in which it was so held. But in Burck v. Taylor, 152 U. S. 635, 14 Sup. Ct. 696, 38 L. Ed. 578, where a contract with a state for the erection of a public building was made unassignable by express stipulation, it was held that an attempted transfer of an interest in the contract without the state's consent was ineffectual further than to give a right of action against the contractor for a measure of the profits. It is argued, however, that that case is to be distinguished from the case at bar in that there was an absolute covenant on the part of the contractor in that case that the contract should not be assigned in whole or in part without the consent of the state. But the contract in the present case having been assented to in all its terms by the contractor is as binding upon him as if his obligations had been affirmatively expressed in a covenant to abide by the same."

The court then went on to quote the following language of *Burck v. Taylor:*

"It may be conceded that primarily, it was a provision intended, although not expressed, for the benefit of the state, and to protect it from interference by other parties in the performance of the contract, to secure the constant and sole service of a contractor with whom the state was willing to deal, and to relieve itself from the annoyance of claims springing up during or after the completion of the contract in favor of parties of whose interest in the contract it had no previous knowledge, and to the acquisition of whose interests it had

not consented. Concede all this, and yet it remains true that it was a stipulation which was one of the terms of the contract and binding upon the contractor, and equally binding upon all who dealt with him."

The court further said:

"We see no reason why this provision of the contract under consideration shall not be given the meaning and effect which its words import. It plainly stipulates against the assignment of the payments. There must have been substantial grounds for embodying such a provision in the contract. We may assume that one of the purposes, and probably the principal purpose thereof, was to protect subcontractors in their equitable rights to the unpaid funds in the hands of the city in case notice should be given under section 1184, and to afford such subcontractors better opportunity to secure payment for that which they might contribute to the work which was under construction, as well as on behalf of the city to avoid the possible complications and litigation that might attend the transfer to another of the payments accruing under the contract."

From these authorities it appears evident that this court has squarely decided that a provision in a contract between a State or municipality and a contractor, prohibiting the assignment of moneys due under the contract, is not merely for the benefit of the public body, but may be taken advantage of by anyone. The question was squarely presented and recognized in *Burck v. Taylor,* supra, the court there deciding that the validity of the assignment without the required consent could be questioned by anyone.

B. Interest of Municipality Demands that Subcontractor be Protected Against Assignments of Moneys Without Consent of Municipality.

The appellee, Welles, the subcontractor of the contract between the Board of Public Works of San Francisco and the Metropolis Construction Company, is not in the position of a disinterested third person who is seeking to avoid the effect of the inhibition of assignment of moneys by some technicality. The equities in this case are strongly in favor of the appellee, Welles. It was the money, the property and engineering skill of the appellee, Welles, that created the fund here in controversy. The subcontract in favor of appellee, Welles, is uncontested by anyone and was recognized as valid by the referee in bankruptcy (Tr. pp. 150-151).

The *fourth* progress payment was not the final payment under the contract, but accrued during construction and before the completion of the work called for by the contract. The *fifth* progress payment, amounting to over $11,000, was the final payment (Tr. p. 149). In making the contract, the city had in view the fact that some and perhaps much of the work to be done would be performed by subcontractors, for the contract expressly provides for the assignment of parts of the contract (Tr. p. 136), with the consent of the municipal authorities. The record shows that the Metropolis Construction Company had several other contracts with the city for the construction of sewers (Tr. pp. 139-140). It was obviously of

the very highest importance to the city that a subcontractor, engaged in the construction of this work, should not be embarrassed, financially or otherwise, in executing the city's work. The contract provided for and contemplated progressive payments by the city (Tr. p. 135). The purposes of this provision are apparent. One of these purposes was to permit the contractor to carry on and complete the work with a smaller amount of capital than would be required if the contractor had to wait for his money until final completion and acceptance of the work. So, with a subcontractor, he was not obliged to have on hand, at the outset, sufficient capital to carry through his subcontract to completion, but could depend upon the progressive payments with which to finance the next installment of the work. If, when any progressive payment is due, the subcontractor is disappointed in receiving his compensation therefrom, because that particular progressive payment has been assigned by the contractor to a bank, the subcontractor might be so embarrassed as not to be able to go on with his contract and the work would be brought to a standstill. This might mean that one of the city's main thoroughfares might be all torn up and must necessarily remain so torn up for a considerable period of time until the city authorities can pursue other means for the completion of the work. This contingency, not at all unlikely, would

greatly inconvenience the municipal government. Furthermore, it would be highly detrimental to the comfort and financial welfare of the inhabitants of the city, not alone those whose places of business or residence fronted upon the street upon which this traffic had been brought to a standstill, but as well those having occasion to use the street at all.

It cannot, therefore, be said that the city did not have in mind the interests of the subcontractor in framing the provision against assignment of the moneys due under the contract, for the interest of the subcontractor was the interest of the city. In this particular case, it was the *fourth* progressive payment that was assigned. The appellee, Welles, had a right to assume, from the terms of the contract, that the fourth progressive payment would not be assigned and that he could count on receiving therefrom the money with which to complete that portion of the city's work which he had contracted to do. The record here shows that the contractor was thrown into bankruptcy while this work was in progress and that the appellee, Welles, had to complete, and did complete his contract with the city in conjunction with the temporary receivers appointed by the court and thereafter in conjunction with the trustee of the bankrupt's estate (Tr. pp. 138, 149).

The interest of the city demanded that Welles be unhampered in completing the work he had un-

dertaken to do. The city not only wanted the work done and well done, but it was most important that the work be done expeditiously and without interruption. It was a paramount consideration to the city that the contractor should not divest itself of the fund, earned and created by the subcontractor, upon which the subcontractor relies for the completion of the city's work.

The provision in question is not against public policy, while on the other hand the public interest demands that such a provision be enforced to the letter.

Furthermore, the appellant must be charged with notice of the terms of the contract at the time it took the assignment. The contract was between the Board of Public Works, acting as the agent and on behalf of the City and County of San Francisco, and the Metropolis Construction Company. It was, therefore, a public contract and a public record. Therefore, anyone taking an assignment of any interest under the contract would be charged with notice of the terms of the contract, and the contract expressly prohibiting any assignment, legal or equitable, of the moneys due under the contract. Knowledge of the invalidity of an attempted assignment must, therefore, be imputed to the appellant at the time it took the purported assignment. Therefore, it would seem that the equities in the case are not with appellant.

In conclusion appellees contend:

First, that a provision in a contract between a municipality and another rendering a claim for moneys due from a municipality unassignable without the consent of the municipality, is valid. We have seen that the general rule is that parties to a contract may validly provide that it shall not be assigned, and that such a provision is not a restraint on alienation. It is apparent that the insurance cases cited by appellant are not in point, but that parties may validly prohibit assignment of moneys due under a contract, and we have seen that there are additional and further reasons for holding that in contracts of municipalities prohibition of assignments of moneys due thereunder should be sustained, in that such assignment enables the city to avoid taxation and expense of litigation.

Secondly, that a provision rendering moneys due under a contract unassignable, either legally or equitably, is not merely for the benefit of the municipality, but renders invalid an attempted assignment of such a consent. This rule has been established by this court in the case of *Burck v. Taylor,* which has been followed in a number of jurisdictions.

Finally, the interest of the municipality demands that a subcontractor be protected against assign-

ments of moneys without the consent of the municipality.

Dated, San Francisco,
May 24, 1916.

Respectfully submitted,

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